UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LIBERTY TRANSIT MIX, LLC

and

Cases 07-CA-271762
07-CA-273754

LOCAL 324, INTERNATIONAL
UNION OF OPERATING ENGINEERS
(IUOE), AFL-CIO

Dynn Nick, Esq.,
for the General Counsel.
Sheryl A. Laughren, Esq., and
Mark E. Straetmans, Esq.,
Detroit, Michigan,
for the Respondent.
Amy Bachelder, Esq.,
Detroit Michigan,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. A trial in this matter was held before Administrative Law Judge David I. Goldman on May 18 and 19, 2021.[1] Following the conclusion of the hearing, and briefing by the parties, Judge Goldman became unavailable to the Board within the meaning of Section 102.36(b) of the Board's Rules and Regulations. On September 1, 2021, the Deputy Chief Administrative Law Judge reassigned this matter to me. Subsequent to that reassignment, all parties submitted letters stating that they waived a hearing denovo and consented to the issuance of a decision by me based on the record made before Judge Goldman.

[1] Due to the compelling circumstances created by the Coronavirus Disease pandemic, the trial was conducted remotely by videoconference using Zoom technology and under appropriate safeguards. See *William Beaumont Hospital*, 370 NLRB No. 9 (2020).

Local 324, International Union of Operating Engineers, AFL-CIO, (the Union or the Charging Party) filed the first charge on January 25, 2021, and the second charge on March 8, 2021. The Regional Director for Region 7 of the National Labor Relations Board (Board or NLRB) issued the Complaint on April 20, 2021. The Complaint alleges that Liberty Transit Mix, LLC, (the Respondent or the Employer) failed to bargain in good faith with the Union, and violated of Section 8(a)(5) and (1) of the National Labor Relations Act (Act or NLRA), at various times from about January 2020 to January 19, 2021, by: failing and refusing to meet at reasonable times and/or places and to respond to the Union's requests for bargaining dates; failing and refusing to review or provide a response to the Union's contract proposal dated July 23, 2020; engaging in an overall course of refusal to bargain in good faith; and withdrawing recognition from the Union on January 19, 2021. The Respondent filed a timely Answer in which it denied that it committed any of the violations alleged.

On the entire record, and after considering the briefs filed by the parties, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a limited liability company with an office and place of business in Shelby Township, Michigan, where it is engaged in the production, nonretail sale, and distribution of concrete. In conducting these operations, the Respondent annually purchases and receives at its facility in Shelby Township goods valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

The Respondent produce, sells, and delivers concrete mix. In a representation election on January 6, 2020, a unit of loaders and drivers employed by the Respondent at its Shelby Township facility voted 10 to 2 in favor of being represented by the Union.[2] On January 14, the Board certified the Union as the collective bargaining representative of the unit employees.[3] Lawyers representing the Respondent and a business

[2] There were 14 employees in the unit, but the record shows that only 12 cast ballots.

[3] The certification defines the unit as: "All full-time and regular part-time loaders and drivers employed by the Employer at or out of its facility located at 7520 23 Mile Road, Shelby Township, Michigan; but excluding guards and supervisors as defined in the Act." General Counsel Exhibit Number (GC Exh.) 2.

representative for the Union began bargaining for an initial labor contract on February 27, 2020.

The parties did not reach a labor contract during the 1-year period following the Board's January 14, 2020, certification of the Union.[4] On January 18, 2021, the Respondent received a petition signed by four of the six remaining unit employees stating that those employees no longer wished to be represented by the Union. The next day, January 19, the Respondent notified the Union that it was withdrawing recognition. As of that time, the parties had engaged in contract negotiations on four occasions, the most recent being July 23, 2020.

On January 25, 2021, the Union filed a charge (Case 07-CA-271762) alleging that "[o]n January 19, 2021 the [Respondent] refused to bargain with the Charging Party Union as the exclusive collective bargaining representative of its employees, by withdrawing recognition from it." On March 8, 2021, the Union filed a second charge (Case 07-CA-273754), served on the Respondent the next day, alleging that "[i]n the last six months the [Respondent] has refused to bargain in good faith with the Charging Party Union."

B. THE COURSE OF BARGAINING

1. Time Period from Certification on January 14 to the Bargaining Session on July 23.

The Union was certified on January 14, 2020. On January 23, Joshua Beaton, a business representative for the Union, reached out to the Respondent's negotiators about meeting in person prior to beginning bargaining. The parties had such a meeting on February 17 and, as planned, did not engage in bargaining. The parties had their first bargaining session on February 27, one of four such sessions. Beaton was the lead negotiator for the Union. Bruce Kincaid, a bargaining unit employee and steward, attended all of the bargaining sessions and Aaron Robbins, another union business representative, attended one or two of the sessions. Two attorneys – Martin Leavitt and Paul Robinson – were the negotiators for the Respondent. Jeffrey Prell, the Respondent's sales manager, also attended the bargaining sessions. After each bargaining session, Prell met with Cheryl Menlen – the Respondent's owner – to report on the bargaining session.

At the February 27 session, the Union presented the Respondent with a proposal for a collective bargaining contract. That proposal addressed many of the economic issues, but not wages. Three days before that first bargaining session, the Union had requested that the Respondent provide wage and benefit information for the bargaining unit employees. Some of this information was provided to the Union in advance of the

[4] "Upon certification by the NLRB as the exclusive bargaining agent for a unit of employees, a union enjoys an irrebuttable presumption of majority support for a one year." *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 777-778 (1980), citing *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27, 37 (1987).

February 27 session, but the Respondent did not provide the wage information until later during the bargaining on February 27. Subsequent to the February 27 bargaining session, the Respondent asked for the Union's wage proposal and the Union, on March 11, provided a second contract proposal, this time including the Union's proposal on wages.

On March 24, before the parties met for bargaining again, an 11-week statewide Coronavirus safety order intervened. During that period, the Respondent shut down operations and laid off all of the bargaining unit employees. Beaton, in emails sent on April 2 and May 22, asked Leavitt and Robinson to continue bargaining during this period using email and telephone conferences. Respondent Exhibit Number (R Exh.) 1, Pages 12 and 13. Leavitt declined, stating to Beaton in a May 27 email that the Respondent would be able to respond to the Union's proposals "upon the lifting of the shutdown order." Ibid. In the immediate aftermath of the shutdown period, the Respondent's business was reduced by 40 percent as compared to the same period a year earlier, and the bargaining unit was down to seven employees.

When the Coronavirus safety order was lifted, the parties agreed to bargain on June 18, June 26 and July 8. The parties met to bargain as planned on June 18 for their second bargaining session. At this meeting, the Respondent presented its first contract proposal to the Union. During that meeting, Beaton asked the Respondent for health insurance information for 2020. Leavitt told Beaton that he would provide that information. However, the information was never provided to Beaton by Leavitt or anyone else. The parties were next scheduled to meet on June 26, but Beaton cancelled that meeting, explaining that he "had a family matter that come up that I needed to take care of." On July 8, the parties met for their third bargaining session.[5] The record does not reveal much about this meeting other than that the Union provided the Respondent with its 3rd contract proposal, in this case a counter to the Respondent's June 18 proposal.

As of the beginning of July, the most significant contract issue dividing the parties, and the one that the parties spent the most time discussing, concerned retirement benefits. Tr. 51-53, 230. The Respondent's proposal was to retain its existing retirement benefit – a 401K plan with the Respondent matching a percentage of each employee's contributions. The Union's proposal was to bring the unit employees into the Union's pension plan. Leavitt and Robinson told Beaton that it would be very difficult to persuade the Respondent to agree to any contract at all that included switching to the Union's pension plan. Other outstanding issues included wages and health insurance.

The parties' fourth bargaining session, on July 23, was an eventful one. The Respondent's representatives began by providing the Union with a response to the Union's July 8 proposal. The Union reacted to the Respondent's proposal by making a

[5] During some of the time period relevant to this proceeding, the parties also had communications relating to the termination of a unit employee. Those discussions were not part of the contract negotiations.

comprehensive counter proposal that included two important concessions. First, the Union abandoned its proposal to bring the unit employees into the Union's pension plan. The Union agreed that, as proposed by the Respondent, the unit employees' retirement benefit would continue to be participation in the company's 401k plan, but the Union sought an increase to the rate at which the Respondent would match employees' contributions. The second major concession was the Union's agreement to the Respondent's wage schedule.[6]

Leavitt told Beaton that the Union's concessions would help move the parties towards an agreement. Tr. 54. Prell testified that the Respondent's view was that, based on the Union concession on the pension issue, the parties "were getting a lot closer" to an agreement. Tr. 230. As of this point in negotiations the parties had reached a number of other tentative agreements on contract provisions. With the exception of the delay related to the Coronavirus safety order, negotiations had gone reasonably smoothly up until this time.

2. Time Period from July 23 Bargaining Session to Respondent's Change of Negotiator.

Curiously, after the acknowledged progress represented by the Union's July 23 proposal, negotiations stalled. The Respondent never stated whether it was accepting or rejecting the Union's July 23 proposal, and never made a counteroffer to it. Indeed, following the Union's concessions on July 23, the Respondent never met with the Union again for contract negotiations despite, as discussed below, repeated attempts by the Union to schedule such negotiations.

During a meeting that took place on August 11 regarding a matter unrelated to contract negotiations, Beaton mentioned that the Respondent had not responded to the July 23 proposal and Leavitt answered that he was waiting on an answer from the Respondent's owner. On August 14, Respondent sent an email to Beaton asking to bargain on August 20. R Exh. 1 at Page 34. The Respondent, however, cancelled its own requested bargaining date, explaining in an August 18 email to Beaton that the Respondent's owner was "absolutely swamped." General Counsel Exhibit Number (GC Exh.) 5. The Respondent's August 18 email also linked the cancellation to the Union's request for health insurance information, stating that the Respondent was in the process of obtaining that information from the carrier. However, as noted previously, the Respondent did not provide that information to the Union in August or *ever.* Prell testified that, while he was aware that the Union had requested the health insurance information, the Respondent did not provide it. Tr. 233-234, 236-237.

[6] The Union's July 23 proposal initially included hand-written material. GC Ex. 7. On July 29, Robinson asked Beaton to provide a "clean copy." The Union sent the fully typed, "clean copy," of the same July 23 proposal to the Respondent by email on August 5. Joint Exhibit Number (J Exh.) 6 (Local 324 Rejects Proposal Presented by Company on 7/23/2020 Counter with the Following Package Proposal on 7/23/2020 (sent via email 8-5-2020)").

When the Respondent cancelled the August 20 bargaining session, it stated that it could meet on August 28 instead. GC Exh. 5. Once again, however, the Respondent subsequently cancelled the bargaining date that the Respondent itself had proposed. In an email dated August 27, the Respondent stated that it was necessary to cancel the August 28 bargaining session because the employer's owner was "inundated" by the "rush of business" and because the Respondent required a "a meaningful opportunity to evaluate" the Union's July 23 proposal and prepare relevant "economic forecasts." GC Exh. 4 at Page 10. The Respondent stated that after these steps it would be "in a much better position to provide a full response to the [July 23] proposal." Ibid. However, the Respondent never notified the Union that the meaningful evaluation or economic forecasts it referenced on August 27 had been completed, nor did it ever provide the promised "full response" to the July 23 proposal.

After the Respondent cancelled the August 28 bargaining session, the Union emailed the Respondent on August 30 and stated that, in the interests of speeding negotiations along, the Union was willing to receive the company's response to the Union's July 23 contract proposal via email. GC Exh. 4 at Page 9. The Respondent answered on September 1, but without commenting on the Union's suggestion to speed the process by using email. Instead, the Respondent stated that it could not respond to the Union's proposal – made over 5 weeks earlier – since Leavitt and Robinson had not yet been able to complete a "careful review" of the proposal, after which they would have to "discuss each detail" with the client. Ibid. The Respondent's counsel did not explain how its claim that counsel had to complete a review before discussing it with the client could be squared with its prior claim that the delay was with the client itself, who counsel had previously claimed was inundated by the rush of business.

In an email on September 4, the Union asked the Respondent to meet for negotiations on September 14 or 15. Id. at Page 4. The Respondent did not reply to that request – neither agreeing to those dates, rejecting those dates, nor proposing alternative dates. Although the Respondent never made a comprehensive response to the July 23 proposal, in September the Respondent and the Union did have some email exchanges relating to the Respondent's stated concern that contract language regarding "construction or road building work" was ambiguous. The language that the Respondent described as ambiguous had, in fact, been included in the Respondent's own contract proposals of June 18 of July 23. Nevertheless, on September 4, the Union attempted to allay the Respondent's newfound concern over the language by offering revised language. The Respondent, in a September 9 email, opined that the Union's revision "create[d] as many or more questions than it answers." The Respondent did not offer a proposed revision, or solution, of its own, despite the fact that, as pointed out above, the Respondent had previously included the purportedly ambiguous language in its own contract proposals.[7]

[7] The Respondent had previously, in its August 27 email to the Union, opined that some language in the Union's proposal was "confusing and will need some clean-up to avoid any possible ambiguities in the future." GC Exh. 4 at Page 10. The email stated that the Respondent would be "working on cleaning that language up for our next draft." Ibid. The Respondent never provided the Union with a "next draft" of any kind.

As of September 30, the Respondent still had neither agreed to meet again for bargaining nor informed the Union whether the company was accepting, rejecting, or countering the comprehensive contract proposal the Union made 10 weeks earlier on July 23. In a September 30 email, the Union asked the Respondent when the Union might hope for a response to the July 23 proposal and for dates to resume bargaining. GC Exh. 4 at Page 4. Leavitt sent an email to the Union on October 1. That email did not state when the Respondent would respond to the July 23 proposal or resume bargaining. Instead, Leavitt informed Beaton at that time that the Respondent had "elected to transfer responsibility for scheduling and negotiating a collective bargaining agreement with your local Union from [Leavitt and Robinson] to: Sheryl A. Laughren, Berry Moorman PC." Id. at Page 3.

The discussion immediately above summarizes what the Respondent told the Union were its reasons for not responding to the Union's proposal during the period from July 23 to September 30. As to what exactly the Respondent was, in fact, doing with the July 23 proposal during that time, the Respondent did not present the testimony of either the negotiators from that period (Leavitt and Robinson) or of the owner (Menlen), even though those are the individuals whose activities the Respondent claimed had necessitated the delays. What the Respondent did present was the testimony of Prell – the sales manager who attended the bargaining sessions and reported on them to Menlen. As best I can tell from Prell's testimony, the Respondent treated the Union's dispute-narrowing July 23 proposal as something akin to a hot potato. Prell stated that a couple of days after the Union made the July 23 package proposal, he reviewed it with Menlen in detail. Then, in early August, after Menlen and Prell made their "notes on it," they passed it Tony Caputo, the Respondent's corporate attorney. Tr. 185-186, 232-232. This testimony is at odds with the Respondent's statements during negotiations that the August 20 and 28 bargaining dates had to be cancelled because Menlen had been too "swamped" to review the July 23 proposal. In reality she had already reviewed and made notes on the proposal. Then Caputo handed the Union's July 23 proposal back to Menlen in early August. Tr. 232-233, 244.[8] After Menlen received it, Menlen and Prell handed the Union's July 23 proposal back to Leavitt and Robinson. At the beginning of September, Leavitt and Robinson passed it back to Menlen and Prell. Tr. 188.

And what of the Respondent's August 27 statement that it could not yet respond to the July 23 proposal, or meet for further bargaining, because of the owner's efforts to prepare economic forecasts? Prell was examined about that at trial, and stated that to his knowledge this referred to "oral talk" between Menlen and himself. Tr. 196, 237-239. This "talk," Prell testified, was in the nature of: "What if this happened. What if that

[8] In its brief, the General Counsel contends that Prell's testimony shows that the Respondent actually had prepared a contract proposal countering the July 23 proposal, but never shared it with the Union. See Brief of General Counsel at Pages 9 (citing Tr. 244-245), 16 and 18; see also Tr. 188. I find that the testimony cited is ambiguous and fails to establish that this is the case. Although Prell made references to the Respondent possessing a contract proposal, the testimony does not indicate that this was the Respondent's own completed contract counter proposal, rather than a marked-up version of the Union's July 23 proposal.

happened . . . . [J]ust running different scenarios, financial scenarios." Ibid. Although the Respondent's negotiators stated that delays in completing bargaining-related tasks resulted from being "inundated" by the "rush of business" and being "swamped," Prell testified that the Respondent's level of work during the July 2020 period was down 40 percent from the same period the prior year. Tr. 173-174.[9]

The bargaining conduct discussed above, suggests that the Respondent, rather than being encouraged by the Union's July 23 movement on key issues, reacted to that movement with concern that its negotiators could be getting close to arriving at acceptable contract terms.

3. Respondent's October 1 Substitution of Laughren as Negotiator

As noted above, on October 1, Leavitt informed Beaton by email that the Respondent had removed Leavitt and Robinson as its negotiators. The email identified Laughren, an attorney from a different law firm, as the Respondent's new negotiator and provided contact information for her. Prell testified that Menlen was the official who made the "call" to have Laughren replace Leavitt and Robinson. Menlen was not called as a witness to testify about any matter, including her reasons for switching to a new law firm for contract negotiations.[10]

When she took over as the Respondent's negotiator, Laughren prepared for bargaining by having discussions with the Respondent's owner and the owner's husband, Tr. 150-151, and receiving copies of the parties' bargaining proposals, Tr. 147-148. She testified that she did not, however, discuss what was going on in negotiations with either the prior representatives (Leavitt and Robinson), Tr. 148, or with Prell, Tr. 149-150. Nor did she review the prior email communications between the parties regarding the negotiations.[11] Laughren testified and conceded that the Respondent owed the Union a response to the July 23 comprehensive contract

[9] It is also true that Prell stated that the Fall season, before the Winter weather interferes with construction work, is the Respondent's busy season. Tr. 195. Granting that this is true, Prell's testimony still indicated that the Respondent was considerably less busy during the year in question than it had been in the past. At any rate, the first day of Fall 2020 was not until September 22 – well after the August 18 email in which the Respondent relied on the purported rush of business to explain its cancellation of bargaining.

[10] Although Menlen was not called as a witness, the Respondent did have Prell testify about this matter. Prell testified that his "belief" was that Menlen made the decision to change representatives because she was unhappy with the way Leavitt and Robinson were handling a challenge to the termination of an employee. The basis for Prell's "belief" that this was the reason for the replacement was not explored and, at best, would seem to be based on out-of-court statements by Menlen, who the Respondent chose not to call as a witness. Under the circumstances, I give no weight to Prell's testimony about Menken's motivation for changing bargaining representatives mid-stream.

[11] Laughren did not obtain those email communications to prepare for bargaining. She only reviewed them much later, at the time when the Respondent withdrew recognition from the Union. Tr. 147-148.

proposal, Tr.148, but she said that she did not figure that out until well after the October outreach between the parties. If Laughren had performed any review of the parties' bargaining proposals at all, however, it is hard to fathom how she failed to realize that the Respondent owed the Union a response to the July 23 proposal. There were six proposals, the last of which was the Union's July 23 proposal, which expressly responded to the Respondent's most recent proposal. Joint Exhibit Number (J Exh.) 6; see also Footnote 6, supra. Laughren's testimony suggested that she did not become aware that she owed the Union a response to the July 23 proposal until she sent the letter withdrawing recognition. At that time, she obtained the emails that had been exchanged between the parties prior to her entrance into the negotiations. Tr. 148.

During the period when Leavitt and Robinson were handling negotiations for the Respondent, there had not been any notable problems with the parties' ability to receive communications from one another. After Laughren took over as the Respondent's negotiator, however, missed communications became a recurring problem. Beaton emailed Laughren on October 16 and asked whether Laughren was "available this afternoon to have a quick phone conversation on how and when you would like to proceed." On October 19, Laughren responded that she was "unavailable today," had called and left a message to that effect, and would "ring" Beaton the next day. Beaton testified that he never received Laughren's phone message, although he did receive the email message referencing it. Later that day, Beaton sent an email to Laughren stating that she could call him the next morning any time after 10 am. Laughren testified that she did not receive that email, but that she nevertheless called Beaton and left a message on October 21. Beaton testified that he did not receive an October 21 phone message from Laughren. I conclude that it is not necessary for purposes of this decision to make a finding regarding the question of whether Laughren did, or did not, receive the October 19 email from Beaton.[12] Nor is it necessary to make a finding regarding whether Beaton received an October 21 phone message from Laughren.[13]

[12] I recognize that it is possible that Beaton's October 19 email was sent, but not received or recognized by Laughren, due to a recurring technological issue with the Union's email system, which caused Beaton's email to sometimes substitute an erroneous, non-existent, sender address of "Joah" Beaton, in place of the correct "Jonah" Beaton sender address. See Tr. 216, 255. Nevertheless, I reject the Respondent's suggestion that the Joah/Jonah issue shows that Beaton fabricated his October 19 email, GC Exh. 4, Page 1; Brief of Respondent at 18-20, 26-27. The Respondent's allegation of fabrication is contrary to the record evidence. First, the evidence clearly establishes that, on December 7 and 8, 2020 – well before the Respondent withdrew recognition or raised any issue regarding the authenticity of Beaton's October 19 email – Beaton contacted the Union's technological support staffer about the Joah/Jonah email issue. This was confirmed both by documents showing those contacts and by the testimony of the Union's technological support staffer. Union Exhibit Number (U Exh. 2); Tr. 264-265. Moreover, it is implausible that Beaton would go to such lengths to falsify evidence regarding his response to Laughren's own October 19 email since Laughren's statement that she would "ring" Beaton the next day did not request, and was not contingent upon, any response or confirmation from Beaton. Indeed, according to Laughren's testimony her putative failure to receive an October 19 email from Beaton did not delay bargaining inasmuch as she proceeded to phone Beaton on October 21 anyway.

[13] Laughren testified that she phoned Beaton on October 21, but did not reach him and left a phone message. Tr. 140-141. Beaton denied that he received an October 21 call or phone

Beaton testified that, on November 2, he sent an email to Laughren asking to resume bargaining and setting forth his availability. Tr. 84. The General Counsel submitted a copy of this email as an exhibit. GC Exh. 4, Page 1. In it, Beaton states that the Union was "looking forward to resuming negotiations" and was available anytime on Thursday or Friday, whether in person or using Zoom." Laughren testified that she did not receive this email. However, the Respondent's own witness on "computer forensics" testified that his analysis showed that Beaton's November 2 email was authentic, was successfully sent, and that it was sent to Laughren's email address. Tr. 212, 216-218.[14] The Respondent provides no reason why an email that its own forensic expert testified was authentic and successfully sent to Laughren's email address would not be received by Laughren. As multiple courts have held, the presumption of receipt that applies to properly addressed and mailed letters also extends to properly addressed and sent emails. See *Ball v. Kotter*, 723 F.3d 813, 830-831 (7th Cir. 2013), *American Boat Co., Inc. v. Unknown Sunken Barge*, 418 F.3d 910, 914 (8th Cir. 2005), *Kennell v. Gates*, 215 F.3d 825, 829 (8th Cir. 2000), *Stephenson v. AT&T Services*, 2021 WL 3603322, at *5 (E.D. Pa. 2021), and *Todd v. XOOM Energy Maryland,* 2020 WL 1552769, at *17, fn. 13 (D.Md. 2020); cf. *Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it . . . was actually received by the person to whom it was addressed."). The addressee's denial of receipt is insufficient, on its own, to rebut the presumption of receipt. See, e.g., *Federal Deposit Insurance Corporation v. Schaffer*, 731 F.2d 1134, 1138 (4th Cir. 1984) and *Bosiger v. U.S. Airways*, 510 F.3d 442, 452 (4th Cir. 2007). The documentary evidence, the testimony of Beaton, and the testimony of the Respondent's own computer forensics witness show that the application of this presumption is appropriate with respect to Beaton's November 2 email to Laughren. I find that Beaton's November 2 email was received by Laughren, and that her testimony to the contrary was inaccurate.

Laughren and Beaton had no further communications between the time of Beaton's November 2 email and when Laughren wrote to Beaton, on January 19, 2021, to inform him that the Respondent had withdrawn recognition from the Union. Beaton testified that he did not reach out during that period because he was awaiting a

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message from Laughren. Tr. 78-81. Based on my review of the testimony and other record evidence, I find that the evidence does not establish that Laughren did, or did not, leave a phone message for Beaton on October 21. Beaton stated that he did not "believe" he received such a message and the General Counsel submitted phone records for Beaton, which did not include an October 21 call from any phone number the Respondent has claimed was Laughren's. Tr. 81-82; GC Exh. 6. Laughren's testimony on this point was notably vague. She did not recall whether she called Beaton on his cell phone or his office phone, nor whether her message was that she would call back or that he should call her. Tr. 163-164. Unlike with respect to Laughren's October 19 call, the Respondent did not present phone company records for the putative October 21 call to Beaton.

[14] This email also has the proper sender address for Beaton – that is, it does not share the Joah/Jonah issue that clouds Beaton's October 19 email. I note, moreover, that the Respondent did not provide its own forensics expert with access to Laughren's email account so that he could confirm whether Laughren received the November 2 email. Tr. 217-218.

response from the Respondent to his November 2 email and also because of delays due to "covid issues" at home, the holiday season, and vacation.

4. Employee Petition

On January 18, 2021, the Respondent received a petition dated January 14 and signed by 4 of the 6 then-current bargaining unit members. The petition stated: "I (we) are no longer interested in having the Operators union (Local 324) to represent me (us) with regards to negotiations with Liberty Transit Mix."[15] The day after receiving this petition, Laughren informed Beaton by letter that the Respondent was withdrawing recognition from the Union as the bargaining representative of employees based on the receipt of "objective evidence that the Union has lost majority support."

On April 12, 2021, after filing the charges in this case, the Beaton sent an email to Laughren requesting dates to negotiate. Laughren did not respond to Beaton's April 12 communication, which is not surprising given that the Respondent had withdrawn recognition the prior January.

ANALYSIS

I. ALLEGATION THAT RESPONDENT VIOLATED SECTION 8(A)(5) AND (1) BY REFUSING TO REVIEW AND PROVIDE A RESPONSE TO THE UNION'S JULY 23 PROPOSAL, BY REFUSING TO MEET, BY CANCELLING MEETINGS, AND BY ENGAGING IN AN OVERALL COURSE OF FAILURE TO BARGAIN IN GOOD FAITH.

The National Labor Relations Act (the Act) provides that it is "the policy of the United States," to "encourag[e] the practice and procedure of collective bargaining." Section 1, 29 U.S.C. Section 151. To implement this policy, the Act imposes various obligations on the parties who have a collective bargaining relationship, including the obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(d), 29 U.S.C. Section 158(d); see also *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-349 (1958) and *Burns Sec. Services*, 300 NLRB 1143, 1144 (1990). This obligation means that employers, no less so than unions, are legally required to make "expeditious and prompt arrangements" to meet and confer, *Professional Transportation, Inc.*, 362 NLRB 534, 540 (2015), quoting *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949), and to do so with the same "degree of diligence" that the employer would display in other "important business matters," *Quality Motels of Colorado*. 189 NLRB 332, 336-337 (1971) (quoting *J. H. Rutter-Rex*, supra), enfd. 462 F.2d 1375 (10th Cir. 1972); see also *Fruehauf Trailer Services*, 335 NLRB 393, 403 (2001) (same). The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to

[15] There is no allegation either that the Respondent unlawfully assisted the preparation of this petition, or that the reduction in the number of unit employees from 14 at the time of the representation election to 6 at the time of the petition was the result of any unlawful action by the Respondent.

meet at reasonable times. *Garden Ridge Management, Inc.*, 347 NLRB 131, 132 (2006), citing *Calex Corp.*, 322 NLRB 977, 978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998).

During the period from certification of the Union, until July 23, 2020, the parties met and conferred in a reasonable and reasonably diligent manner. However, the record shows that after the Union made its contract proposal on July 23 – a comprehensive proposal that both sides agree moved the parties substantially closer to an agreement – the Respondent abruptly ceased to approach labor negotiations with anything like the "degree of diligence" one would expect it to accord to "business affairs of importance." Between the time the Union made its July 23 contract proposal and when the Respondent withdrew recognition about 6 months later, the Respondent never once made a counterproposal, or even told the Union whether it was accepting or rejecting the Union's proposal. During that period of time, the Respondent cancelled the August 20 and August 28 bargaining dates – in each case only a day or two before the session was to occur and even though the Respondent itself had proposed those dates. Where as here, a party cancels bargaining dates it previously agreed to, the Board has been particularly inclined to conclude that the party violated its duty to meet at reasonable times. See, e.g., *Professional Transportation, Inc.*, 362 NLRB at 534-535 (cancellation of bargaining sessions "clearly established an impermissible pattern of dilatory conduct by the [employer]"), *Lancaster Nissan*, 344 NLRB 225, 227-228 (2005) (employer violated its duty to bargain at reasonable times where it cancelled several meetings, often at the last minute), enfd. 233 Fed.Appx. 100 (3d Cir. 2007), *Calex Corp.*, 322 NLRB at 978 (employer engaged in a pattern of delay where it cancelled at least three scheduled meetings); see also *Camelot Terrace* 357 NLRB 1934, 1935 and 1937 (2011) (employer required to pay union's bargaining and litigation expenses where it demonstrated overt bad-faith conduct by, inter alia, canceling meetings the day before they were scheduled to occur), enf. granted in relevant part 824 F.3d 1085 (D.C. Cir. 2016).

After the Respondent cancelled the August 20 and 28 bargaining sessions, the Union repeatedly asked the Respondent to bargain or otherwise provide a response to the July 23 contract proposal, but to no avail. On August 30, the Union invited the Respondent to submit a response to the July 23 proposal, but the Respondent did not do so. On September 4, the Union asked to meet for bargaining on September 14 or 15, but the Respondent did not agree to those dates, propose alternative dates, or even state that it was rejecting those dates. On September 30 the Union asked the Respondent for dates when it would be willing to resume bargaining or respond to the July 23 proposal, but the Respondent did not provide dates. By email on October 16 the Union asked the Respondent to have a quick phone conversation that afternoon. In an email on October 19, the Respondent's negotiator stated she would call Beaton the next day, but did not propose bargaining dates or provide a response to the July 23 contract proposal. On November 2, the Union, by email, offered two dates on which it was available to resume bargaining and stated that it was willing to do so either in person or by using Zoom. The Respondent did not agree to those dates, did not propose alternative dates for bargaining, and did not contact the Union to move bargaining forward in any way.

By October 1, when the Respondent notified the Union that it was changing its negotiator, the Respondent had already delayed bargaining by about 2 ½ months from the time of the Union's July 23 contract proposal.[16] The Respondent did this by cancelling meetings, failing to respond to the Union's requests for bargaining dates, and refusing to provide a response to the Union's July 23 proposal.[17] That delay had stretched, by the time of the January 19 withdrawal of recognition, to nearly 6 months. During that same 6-month period the Union did not once cancel a bargaining session or refuse any bargaining date request from the Respondent. The Board has found that employer delays of lesser lengths of time to be unreasonable and unlawful. In *Northeastern Indiana Broadcasting Co., Inc.*, the Board held that an employer violated its obligation to bargain in good faith where it delayed meeting for 5 weeks from the date when the union asked the employer for negotiation dates. 88 NLRB 1381, 1381-1382 and 1390-1391 (1950). In *Quality Motels of Colorado, Inc.*, the Board affirmed that the Respondent had violated its duty to meet at reasonable times when it delayed meeting for almost 2 months after the first negotiation meeting, 189 NLRB at 336-337. In *Fruehauf Trailer Services, Inc.*, the Board found that the employer had violated Section 8(a)(5) and (1) based on conduct that included the employer delaying bargaining for almost 3 months after the union's request for an initial bargaining session. 335 NLRB at 393 and fn.5. In *McCarthy Construction*, the Board affirmed a finding of violation where the employer failed to respond to requests for bargaining for 2 ½ months. 355 NLRB 50, 58 (2010). In *Atlanticare Management LLC*, a violation was found when the employer failed to respond to requests for bargaining dates for 3 months. 369 NLRB

[16] In its post-hearing brief, the Respondent argues that because the Union's second charge was filed on January 19, 2021, no violation can be found based on any conduct occurring more than 6 months before that charge – that is, before September 9, 2020. In making that argument, the Respondent does not mention the earlier of the two charges in this case, which was filed on January 25, 2021, nor does it cite any caselaw. I reject the Respondent's argument. The complaint allegation regarding a course of bad faith bargaining is closely related to, and reasonably grows out of, the allegation of refusal to bargain set forth in the earlier charge, since assessment of whether the Respondent had a good faith basis for withdrawing recognition necessarily implicates unfair labor practices that may have tainted the employee petition upon which the Respondent relied to withdraw recognition. See *Ross Stores*, 329 NLRB 573, 573 fn. 6 (1999) (closely related test) and *Redd-I, Inc.*, 290 NLRB 1115, 1116-1118 (1988) (same); see also *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 and 309 (1959) (Board is not "precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board," since the purpose of the charge is "merely to set in motion the machinery of an inquiry.") Moreover, the course of bad faith bargaining continued well into the 10(b) period for *both* charges. At any rate, conduct prior to the charge filing period is relevant as background evidence regarding the Complaint allegation of a course of bad faith bargaining. See, e.g., *Freuhauf Trailer Services Inc.*, 335 NLRB 393, 405 (2001) and *Rocky Mountain Hospital*, 289 NLRB 1347, 1362 (1988) .

[17] The evidence shows that the Respondent failed to provide the Union with a response to the July 23 proposal, but does not substantiate, as alleged in the Complaint, that the Respondent failed to *review* that proposal. See Complaint Paragraph 8(b)(ii). As discussed in the statement of facts, Prell testified that Menlen, Prell, and Caputo all reviewed the proposal on behalf of the Respondent, and that testimony was not rebutted.

No. 28, slip op. at 22 (2020). The Respondent's nearly 6 months of delay clearly crosses over into the area of failure to bargain in good faith. Indeed, even if one looks only at the 2 ½ month delay between July 23 and October 1 – during which time the Respondent cancelled multiple bargaining sessions and failed to respond to requests to bargain – I would find that the Respondent failed to meet its obligation to make "expeditious and prompt arrangements" to meet and confer, *Professional Transportation,* 362 NLRB at 540, with the degree of diligence it would accord to other business matters of importance, *Quality Motels*, 189 NLRB at 336-337.[18]

The conclusion that the Respondent's delays showed bad faith is buttressed by the fact that the reasons that the Respondent contemporaneously gave the Union for those delays are unsupported. As discussed in the findings of fact, the Respondent told the Union that the delays during the period prior to October 1 were based on the activities of Menlen, Leavitt and Robinson, but the Respondent did not substantiate this by presenting the testimony of any of those individuals.[19] What evidence there is in the record regarding those excuses – that is, Menlen was swamped, that the Respondent had to prepare economic forecasts and obtain insurance information for the Union – suggest that the excuses were not honest. As the Supreme Court has recognized "good faith bargaining necessarily requires that the claims by either bargainer should be honest claims." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); see also *Piggly Wiggly Midwest*, 357 NLRB 2344, 2355 (2012).

I am aware that during some of the periods of delay, especially with respect to the period after Beaton's November 2 email, the Respondent did not cancel bargaining sessions or decline proposed bargaining dates. Rather, after a period of actively avoiding good faith bargaining, the Respondent continued to delay bargaining through passivity – for example, by continuing not to provide the response that Laughren admitted the Respondent owed the Union regarding the July 23 proposal, and failing to suggest bargaining dates or otherwise seek an agreement. This approach of extreme passivity, even if I assume it was not a tactic calculated to frustrate bargaining, still contributes to the Respondent's overall failure to pursue bargaining using the same "degree of diligence" it would display in other "important business matters," *Quality Motels of Colorado*, supra. Indeed, the Board long ago recognized that a failure to bargain in good faith can be established based on course of conduct that includes the

[18] I note that the record shows that the Respondent, when it chose to do so, was quite capable of business-like alacrity and diligence with respect to labor relation matters. Specifically, the Respondent received the employee disaffection petition on January 18, 2021, and the very next day informed the Union that the Respondent had withdrawn recognition. Whatever consultations were necessary between the owner, the negotiator, and corporate counsel, and whatever audit of the petition was performed, must have taken place with a degree of diligence that was profoundly absent from the Respondent's contract negotiations with the employees' chosen bargaining representative. As of the time of the withdrawal of recognition, the Respondent had failed to provide a response to the Union's July 23 contract proposal for nearly 6 months.

[19] The General Counsel asks that I draw an adverse inference from the Respondent's failure to call these individuals as witnesses. I decline to consider whether such an inference is appropriate since I find that the record evidence provides a sufficient basis for my decision.

employer's "passiveness in waiting for the Union to make all requests for meetings" and failure to present counterproposals. *J.H. Rutter-Rex*, 86 NLRB at 474. As the Supreme Court has noted, "It is scarcely conducive to bargaining in good faith for an employer to know that if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties." *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954).[20]

For the reasons discussed above, I find that during the period from July 2020 to January 19, 2021, the Respondent failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) by conduct that included failing and refusing to meet at reasonable times for bargaining and failing and refusing to provide a response to the Union's July 23, 2020, contract proposal.

II. Allegation that Respondent Violated Section 8(a)(5) and (1) When it Withdrew Recognition from the Union on January 19, 2021.

A union certified by the Board enjoys a presumption of majority support for a period of 1 year. *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 777-778; *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed. Appx. 331 (D.C. Cir. 2005). The disaffection petition at-issue in this case was dated January 14, 2021 – the day that the 1-year period ended. The Respondent argues that it lawfully withdrew recognition because the employee petition provided objective evidence that the Union had lost majority support. Brief of Respondent at Pages 24 to 25; see *Johnson Controls*, 368 NLRB No. 20 slip op. at 4 (2019). The General Counsel counters that the Respondent's withdrawal of recognition was unlawful because the petition was tainted by the Respondent's unlawful failure to engage in good faith bargaining with the Union, which continued until the time of the petition. Brief of the General Counsel at Pages 28 to 29, citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), affd. in relevant part 117 F.3d 1454 (D.C. Cir. 1997) and *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001). For the reasons discussed below, the disaffection petition was tainted by the Respondent's ongoing, unremedied, and unlawful failure to bargain in good faith.

"The Board has held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the Union." *United Site Services of California, Inc.*, 369 NLRB No. 137, at 15 (2020). Where, as here, the Respondent's unlawful activity did not directly advance the disaffection petition, the Board decides whether the petition is impermissibly tainted by consideration of four factors.

[20] Based on this caselaw, and the record as a whole, I am unpersuaded that Beaton's failure to reach out to the Respondent again after the November 2 email justifies the Respondent's failure to bargain diligently during this later period. The Union had made the last contract offer and the last outreach regarding the resumption of bargaining. Indeed, the record shows numerous unreciprocated examples of such outreach by the Union after July 23. In light of the Respondent's "rope a dope" defense to good faith bargaining, the Union can hardly be faulted for awaiting a response to its November 2 request and July 23 contract proposal rather than continuously exhausting its resources.

> (1) The length of time between the unfair labor practices and the withdrawal of recognition;
> (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
> (3) any possible tendency to cause employee disaffection from the union; and
> (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Ibid.; *Master Slack*, 271 NLRB 78, 84 (1984).

In this case, the Respondent violated the Act by unlawfully delaying bargaining and otherwise refusing to bargain in good faith for almost half of the certification year. Those unfair labor practices were not only unremedied, but ongoing, when the Respondent withdrew recognition and I find that, under the four-factor analysis, they would be expected to cause employee disaffection from the Union. Regarding the first factor, the "length of time" between the unfair labor practice and the disaffection petition weighs in favor of finding the petition impermissibly tainted since the Respondent's course of bad faith bargaining was ongoing when the disaffection petition was filed. The second factor – the nature of the illegal acts and the possibility of detrimental effects on employees – also favors finding that the petition was unlawfully tainted. The Respondent had unlawfully delayed bargaining for almost 6 months out of the 1-year period during which there was an irrebuttable presumption of majority status. This deprived the employees' union of the ability to bargain during a significant portion of the period when a union is generally at its greatest strength. See *Northwest Graphics, Inc.*, 342 NLRB at 1289 (refusal to bargain during part of the certification year has taken from the union the opportunity to bargain during the period when unions generally have the greatest strength). Therefore, the nature of this violation had a detrimental effect on employees who had voted to have the charging party represent them and who were entitled to a period of negotiation free from a potential, or actual, withdrawal of recognition by their employer. I reach this conclusion without reliance on the fact that certification-year bargaining was cut even shorter due to the 11-week Coronavirus safety order,[21] although as a practical matter that fact would be expected to exaggerate the impact on the certification year of the Respondent's subsequent, unlawful, 6-month refusal to bargain.

Regarding the third factor – any possible tendency to cause employee disaffection from the union – the record supports finding that that the Respondent's unlawful conduct tainted the petition. This factor does not require a showing that the Respondent's misconduct actually caused the disaffection, but only that the misconduct had a *possible tendency* to adversely affect the Union's relationship with unit employees. It is fair to assume that employees who elect a union as their representative do so because they hope they will see improvements to their terms and conditions of employment. The Respondent's unlawful actions delayed and impeded

[21] As noted earlier, the Union asked to continue bargain during that period, but the Respondent refused to do so.

progress towards such improvements during much of the certification year and would reasonably make the bargaining representative appear ineffectual and further bargaining appear futile. This lack of progress would have not just the *possible tendency*, but the *likely tendency*, to cause employees to lose faith with the Union's ability to bring about positive changes in the workplace. In *Fruehauf Trailer Services*, the Board stated that it "has long recognized that dilatory bargaining tactics . . . have a tendency to invite and prolong employee unrest and disaffection from a union." 335 NLRB at 394. Similarly, in *Westgate Corp.*, the Board affirmed that when an employer unlawfully delays bargaining, as the Respondent did here, "unrest and suspicion are generated . . . and the status of the bargaining representative is disparaged." 196 NLRB 306, 313 (1972); see also *Northeastern Indiana Broadcasting Co.*, 88 NLRB at 1390-1391 and fn. 9 (Delay in good faith bargaining "entails more than mere postponement of an ordinary business transaction, for the passage of time itself, while employees grow disaffected and impatient with their designated collective bargaining agents' failure to report progress, weakens the unity and economic power of the group.").

The fourth and final factor – the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union – also supports finding that the Respondent's unlawful conduct tainted the petition. There was no evidence of disaffection during the period between the Union's certification and the commencement of the Respondent's unfair labor practices following the Union's July 23 contract offer. The Board has stated that, under such circumstances, "[t]he lack of prior disaffection is strong evidence of a causal connection between subsequent disaffection and the Respondent's unfair labor practices." *United Site Services*, 369 NLRB slip op. at 16, citing *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007).

For the reasons discussed above, I find that the disaffection petition was tainted by the Respondent's unfair labor practices, and therefore that the Respondent could not lawfully rely on that petition to withdraw recognition, and violated Section 8(a)(5) and (1) on January 19, 2021, by doing so.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act from July 2020 to January 19, 2021, by failing to bargain in good faith with the Union through conduct that included failing and refusing to meet at reasonable times for bargaining and failing and refusing to provide a response to the Union's July 23, 2020, contract proposal.

4. The Respondent violated Section 8(a)(5) and (1) of the Act on January 19, 2021, by withdrawing recognition from the Union as the exclusive collective bargaining representative of the unit employees.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel asks that, as a remedy for the Respondent's violations of its bargaining obligation, I recommend an extension of the certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1962). I find that a 6-month extension is appropriate here. "The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned." *Mar-Jac Poultry*, supra. The extension of the certification year is not an extraordinary remedy, but rather "is a standard remedy where an employer's unlawful conduct precludes appropriate bargaining with the union." *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992), enfd. 9 F.3d 113 (7th Cir. 1993); see also *Accurate Auditors*, 295 NLRB 1163, 1167 (1989) ("The law is settled that when an employer's unfair labor practices intervene and prevents the employees' certified bargaining agent from enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices."). The Board's remedy usually takes the form of an extension of certification for one year, although it may be for a shorter period of time, or even for a "reasonable" time. *G.J. Aigner Co.*, 257 NLRB 669 fn. 4 (1981); *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985); see also *Bemis Company*, 370 NLRB No. 7, slip op. at 4 (2020) (Board grants the full 12-month extension in accordance with *Mar-Jac*). Under the circumstances present here I find that a 6-month extension is appropriate. The Respondent exercised an appropriate degree of diligence in bargaining until July 23 – a date approximately 6 months after the Union's certification and 5 months after the first bargaining session. Various factors are considered in determining what is a reasonable time period in which the parties can resume negotiations without unduly burdening employees with a bargaining representative from which they may have reasons for disaffection other than the Respondent's unfair labor practices. These factors include the nature of the violations found, the number, extent, and dates of the collective-bargaining sessions held, the impact of the unfair labor practices on the bargaining process, and the conduct of the Union during negotiations. *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996). In this case, I find that the 6-month extension is necessary to give the Union the benefit of the certification year for bargaining.

In addition, the General Counsel asks that the remedy include a requirement that the Respondent bargain with the Charging Party in accordance with a schedule of at least 40 hours per calendar month for at least 8 hours per session, until a complete

collective-bargaining agreement or good-faith impasse in negotiations is reached. This is an extraordinary type of remedy, but one which the Board has found it necessary to impose in numerous cases. See, e.g., *Camelot Terrace*, 357 NLRB 1934, 1942 (2011) (Board order requires employer to meet with the union not less than 24 hours per month for at least 6 hours per session), *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn.2 (2011) (requiring employer to bargain with union for a minimum of 15 hours per week), enfd. 540 Fed. Appx. 484 (6th Cir. 2013), *Gimrock Construction, Inc.*, 356 NLRB 529 (2011) (Board orders the employer to bargain with the union for 16 hours a week), enf. of bargaining schedule denied on procedural grounds 695 F.3d 1188 (11th Cir. 2012). In *Camelot Terrace*, supra, the Board imposed a bargaining schedule where, inter alia, the employer had restricted the dates for bargaining and repeatedly canceled bargaining sessions. In *All Seasons Climate Control*, supra, the Board agreed with the administrative law judge that ordering a bargaining schedule was appropriate given the employer's "egregious misconduct," which included withdrawing recognition from the union and refusing to supply necessary and relevant information. I conclude that under the circumstances present here it is appropriate to order the Respondents to adhere to the bargaining schedule that has been suggested by the General Counsel. The Respondent improperly delayed bargaining by, inter alia, refusing to bargain for a period of almost 6 months during the certification year, cancelling bargaining sessions and failing to provide a response to the Union's July 23 contract proposal. I believe it is necessary to have a bargaining schedule that provides some objective indication of whether the Respondent is complying with its bargaining obligations under the Act. The schedule sought by the General Counsel is not, on its face, unduly burdensome.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[22]

ORDER

The Respondent, Liberty Transit Mix, LLC, Shelby Township Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO, as the exclusive certified bargaining representative of unit employees.

(b) Failing and refusing to meet at reasonable times for bargaining with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO.

(c) Failing and refusing to respond to bargaining proposals offered to it by Local

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

324, International Union of Operating Engineers (IUOE), AFL-CIO.

(d) Unlawfully withdrawing recognition from Local 324, International Union of Operating Engineers (IUOE), AFL-CIO as the exclusive collective bargaining representative of unit employees.

(e) In any like or related manner failing and refusing to bargain collectively and in good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO as the exclusive collective bargaining representative of unit employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively and good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time loaders and drivers employed by the Employer at or out of its facility located at 7520 23 Mile Road, Shelby Township, Michigan; but excluding guards and supervisors as defined in the Act.

(b) The Respondent will recognize that the certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

(c) Meet and bargain collectively and in good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO in accordance with a bargaining schedule of at least 40 hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

(d) Rescind the withdrawal of recognition from Local 324, International Union of Operating Engineers (IUOE), AFL-CIO, and notify unit employees in writing that this has been done.

(e) Within 14 days after service by the Region, post at its facility in Shelby Township, Michigan, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region Seven, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 25, 2020.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 18, 2021.

PAUL BOGAS
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail and/or refuse to bargain in good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO, as the exclusive certified bargaining representative for employees in the bargaining unit.

WE WILL NOT fail and/or refuse to meet at reasonable times for bargaining with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO.

WE WILL NOT fail and/or refuse to respond to bargaining proposals offered to it by Local 324, International Union of Operating Engineers (IUOE), AFL-CIO.

WE WILL NOT unlawfully withdraw recognition from Local 324, International Union of Operating Engineers (IUOE), AFL-CIO as the exclusive collective bargaining representative of unit employees.

WE WILL NOT in any like or related matter fail and/or refuse to bargain collectively and in good faith with the International Union and/or Local 228.

WE WILL, upon request, bargain collectively and good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time loaders and drivers employed by the Employer at or out of its facility located at 7520 23 Mile Road, Shelby Township, Michigan; but excluding guards and supervisors as defined in the Act.

WE WILL recognize that the certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

WE WILL meet and bargain collectively and in good faith with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO in accordance with a bargaining schedule of at least 40 hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

WE WILL rescind our withdrawal of recognition of Local 324, International Union of Operating Engineers (IUOE), AFL-CIO, and notify unit employees in writing that we have done so.

LIBERTY TRANSIT MIX, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-271762 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165.